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No. 88-371

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF VERMONT,
Petitioner,

v.

RICK A. PRESTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

FOR PURPOSES OF 28 USC § 1257, THE DECISION OF THE VERMONT SUPREME COURT IS FINAL.

Alleging lack of finality, Respondent contends that this Court should deny the Writ of Certiorari, because Petitioner sought clarification of the State Supreme Court's decision. Petitioner did and continues to seek clarification of two sentences of the state court's decision dealing with an inconsistent recitation of fact. *See* Pet. 1, note 1 and Appendix to Reply Brief 14a. However the pendency of this motion, App. to R.B. 14a, or its predecessor, App. to R.B. 1a, does not change the "final" character

of the Court's order of July 1, 1988. App. 9a. In fact, the Vermont Supreme Court has declared that one clarification, as requested by Petitioner, "does not affect the result and the motion is denied." App. to R.B. 4a.

These motions filed by Petitioner sought correction of the Vermont Supreme Court's erroneous description of certain factual events that had transpired during the investigatory phase of the case. Claims of this kind have been addressed before by this Court. "The final judgment already rendered was not challenged; what was sought was merely the Court's certification that a federal question had been presented to it for a decision, and *this could have no different effect on the finality of the judgment then a like amendment of the Court's opinion.*" *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942) (emphasis added). The State's request is analogous to the situation discussed in Pink.

More recent case law is in accord. In *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 373 n.10 (1984), this Court observed that ". . . the rule requiring suspension of a judgment's finality for purposes of appeal during the pendency of a postjudgment motion for reconsideration applies *only* when such a motion actually seeks an "alteration of the rights adjudicated" in the Court's first judgment." *Ibid.*, quoting from *Department of Banking v. Pink*, 317 U.S. at 266. In the instant case the Court is urged to give the finality requirement "a practical rather than a technical construction", *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 541-547 (1949), since the sought-after correction relates to a factual aspect of the opinion and is not aimed at altering the result in the state court's decision on the federal issue raised by Petitioner.

The pendency of a motion for clarification in this case presents an example of the type of situation addressed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 *et seq.* (1975), that justifies a departure from the fi-

nality rule. In *Cox Broadcasting Corp.*, this Court recognized that there was no reason to await completion of "additional proceedings anticipated in the lower state courts" since "these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice'. . . ." *Id. at* 477-78, quoting from *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Since the result here is preordained, *i.e.*, under the state's court interpretation of federal constitutional law Respondent's confession must be suppressed, the purpose underlying the finality provision in 28 U.S.C. § 1257 is satisfied.

CONCLUSION

Based on the foregoing argument, the decision appealed from by petitioning for Writ of Certiorari is final for purposes of 28 U.S.C. § 1257. The Writ should not be denied.

Respectfully submitted,

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Dated: October 21, 1988

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

MOTION FOR REARGUMENT

NOW COMES the State of Vermont, by and through the Attorney General of the State of Vermont, and moves this Court for reargument pursuant to V.R.A.P. 40, in the above-captioned matter, on the grounds that the Court has misapprehended certain points of fact, as set out in the accompanying memorandum.

MEMORANDUM IN SUPPORT OF MOTION

The opinion of the Court in this case, as revised following the Defendant's Motion for Reargument, contains two factual assertions contradicted by the trial court's findings of fact. Neither party challenged the findings of fact, and the findings on these two issues were supported by the evidence, and so must be upheld by this Court. *State v. Baxter*, 145 Vt. 295, 297 (1984).

The first incorrect factual assertion is contained on page 2 of the slip opinion, and states:

> The team decided to obtain an arrest warrant on the simple assault charge and to use this *pretext* as

> a means of finding defendant and questioning him regarding the homicide.

(Emphasis supplied). Contrary to this assertion, the trial court specifically rejected the contention that the arrest warrant was obtained as a pretext:

> The officers investigating the homicide had no concern with the prosecution of the misdemeanor assault charge. The State's Attorney, however, would have prosecuted this charge and requested a warrant in the normal course of business.

Trial Court's Opinion, finding 16, Printed Case at p. 55. Although the trial court did find that the Defendant would not have been *extradited* absent suspicion that he had been involved in a murder, this Court made no such distinction between the arrest warrant and the decision to extradite. This distinction is significant because an arrest warrant must be supported by probable cause and approved by a judicial officer. The decision to extradite is a discretionary decision by the prosecutor, and many factors may properly influence that decision.

In addition, the trial court specifically refused to decide whether the circumstances of the Defendant's arrest in Florida was pretextual, and, if so, unlawful. The trial court stated, "The court assumes, without deciding, that defendant's arrest was lawful." Printed Case at p. 66.

The second incorrect factual assertion is that "defendant asked that an attorney be appointed to represent him in dealing with the State, *and he continued his efforts to consult counsel while he was being held in custody.*" Slip opinion at p. 7 (emphasis supplied). In fact, the trial court specifically rejected, as not credible, the Defendant's testimony that he had continued his efforts to consult counsel while he was being held in custody. The trial court stated:

> Defendant testified without corroboration that he requested counsel five to ten times while he was in jail. Based on credible evidence, the court finds that he made one written and one oral request for counsel. At no time did he meet with an attorney.

The Defendant testified that at his arraignment he filled out a form requesting a lawyer, and then orally requested an attorney when asked by the judge. Preston transcript, pp. 8-9. In other words, at the arraignment, he made one written and one oral request for counsel, as the trial court found. The Defendant also testified that he orally requested counsel five to ten times while in the cellblock. Preston transcript, pp. 11-12. The trial court rejected this testimony as not credible. Accordingly, the trial court found that the Defendant had *not* "continued his efforts to consult counsel while he was being held in custody."

This fact is significant to the Court's opinion because the Court relied upon it in its holding that the Defendant had asserted, at his araignment, not only his Sixth Amendment right to the assistance of counsel in his defense, but also, prior to any attempt at interrogation, his Fifth Amendment right to the presence of counsel during interrogation. Slip opinion at p. 7.

Dated: July 8, 1988

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

by: /s/ David Tartter
DAVID TARTTER
Assistant Attorney General

cc: Stephen S. Blodgett, Esq.
Terry Trono, Esq.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF VERMONT

June Term, 1988

Supreme Court Docket No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

[Filed Sept. 2, 1988]

Appealed from District Court of Vermont,
Unit No. 3, Washington Circuit

Docket No. 332-3-86WnCr

ENTRY ORDER

In the above entitled cause the Clerk will enter:

In response to the motion for reargument filed by the State on July 11, 1988, a minor revision has been made in the opinion. The change does not affect the result, and the motion is denied.

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

/s/ Albert W. Barney
ALBERT W. BARNEY
Chief Justice (Ret.)
Specially Assigned

/s/ F. Ray Keyser
F. RAY KEYSER
Associate Justice (Ret.)
Specially Assigned

/s/ Edward J. Costello
EDWARD J. COSTELLO
District Judge (Ret.)
Specially Assigned

APPENDIX C

SUPREME COURT

May Term, 1987

No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

[Filed Sept. 2, 1988]

On Appeal from District Court of Vermont,
Unit No. 3, Washington Circuit

Alan W. Cook, J.

Jeffrey L. Amestoy, Attorney General, and David Tartter, Assistant Attorney General, Montpelier, for plaintiff appellant

Stephen S. Blodgett and Paul S. Volk of Blodgett & Watts, Burlington, for defendant-appellee

Present: Allen, C.J., Peck, J., and Barney, C.J. (Ret.), and Costello, D.J. (Ret.), Specially Assigned

COSTELLO, D.J. (Ret.), Specially Assigned. On January 20, 1986, Frank Evans was found murdered in his Barre apartment. While in custody on a unrelated charge, defendant confessed to the crime. He later filed

a motion seeking to have his confession suppressed, and the district court granted the motion, ruling that his confession was involuntary and that the purported waiver of his Fifth Amendment rights was invalid. The state brought this interlocutory appeal pursuant to V.R.A.P. 5(b), and we affirm.

The trial court's detailed findings of fact describe the following sequence of events. An investigation team was formed soon after the murder, consisting of the Washington County state's attorney, an investigator from that office, and detectives from the Barre City police department and the Washington County sheriff's department. Defendant, who had resided with the victim, was regarded as the principal suspect, but he could not be located. The investigating team then became aware of unrelated, simple assault charges that had been pending against defendant since a New Year's Eve fracas in Montpelier. The assault citation required defendant to appear in court for arraignment on February 3, 1986, and the team planned to make contact with him at that time. Because the team wished to question defendant in a noncustodial setting and without the presence of counsel, the state's attorney decided not to file the information and affidavit regarding the assault charge.

Defendant failed to appear for the scheduled arraignment, however, and efforts to locate him continued to be unavailing. The team decided to obtain an arrest warrant on the simple assault charge and to use this pretext as a means of finding defendant and questioning him regarding the homicide. An information was filed on February 7, 1986, and a warrant was issued based on his earlier failure to appear. An investigator from the state's attorney's office circulated a nationwide "wanted person" bulletin, using the National Crime Information Center (NCIC) computer.

On March 13, 1986, defendant was arrested in Florida and arraigned as a fugitive from justice. At arraign-

ment on this charge he requested counsel, and the court appointed a public defender. The Vermont investigation team was informed of the arrest and immediately left for Florida to interrogate him. Upon arrival, the team was informed that defendant had been assigned counsel on the fugitive from justice charge and that he was being held in custody pending further proceedings on that charge. However, the team members made no effort to contact the appointed counsel before questioning him.

A Barre City police detective and the Washington County sheriff met with the defendant, who was still in custody, on March 15, 1986, two and one-half days after his arraignment. Defendant had yet to consult with his appointed attorney, although he had requested such a meeting once in writing and at least once orally.

The two police officers began their interrogation with amicable conversation about defendant's travels to Florida and about mutual acquaintances in Vermont. Forty minutes after they began questioning him, the officers read a *Miranda* warning. Defendant was asked if he understood each right after it was read to him, and he indicated that he did. Defendant then orally agreed to waive those rights, and the interrogation proceeded.

Approximately thirty minutes after the *Miranda* warning was given, defendant was asked about the Evans murder. At no time until this point, approximately one hour and fifteen minutes after confronting him, had the officers mentioned the homicide investigation. Although he initially denied the murder, defendant confessed his guilt soon after he was questioned directly about the killing. He then agreed to a taped interview, which was conducted after the two police officers consulted with the state's attorney about the questions to be asked. The following day, March 16, 1986, defendant signed a written confession.

On March 17, 1986, defendant waived extradition and was transported back to Vermont. A second written con-

fession was obtained on the morning after his arrival. Subsequently, he met with counsel for the first time since his arrest in Florida, and was then arraigned on a charge of first degree murder.

Defendant later filed a pretrial motion to suppress all inculpatory statements, written and oral, made to the investigating team. After a series of hearings, the trial court issued findings of fact and conclusions of law and granted defendant's motion. The ruling was based upon a "totality of the circumstances" analysis, and significant weight was assigned to the following factors: defendant's age of nineteen years, his eighth grade education, his inexperience with the criminal justice system, his isolation for more than two days prior to interrogation, and the absence of counsel. The court also emphasized the investigation team's intent to question defendant in a noncustodial, uncounselled setting and their failure to inform defendant regarding the subject matter of the questioning. The court concluded that the State had failed to prove either that defendant's *Miranda* waiver was voluntary, knowing, and intelligent or that his confession was voluntarily given. We affirm the court's ruling on the suppression motion, but we do so on other grounds.

The State argues first that the trial court erred in relying upon the factors cited in its totality of the circumstances analysis. It is unnecessary to address that contention, however, because the trial court's approach was rendered inapplicable by a single factor: defendant's request for counsel. Once a criminal defendant has invoked his right to counsel under the Fifth Amendment,*

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* The Fifth and the Sixth Amendment provide a criminal defendant with two distinct rights to counsel. No Sixth Amendment analysis is included here because the constitutional right to counsel under that Amendment had not yet attached at the time of the interrogation regarding the murder. The Sixth Amendment right to counsel attaches only when a "critical stage of the prosecution"

he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). If the authorities initiate further interrogation in these circumstances, then any waiver of the defendant's right to counsel for that interrogation is invalid. *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404, 1411 (1986).

Here, the lower court found that defendant requested counsel at his Florida arraignment on the fugitive from justice charge and that he made further requests to see his attorney while he was incarcerated. That court's findings also indicate that, despite this state of affairs, the investigation team proceeded to interrogate him in an uncounselled setting. Therefore, under the "bright line" rule enunciated in *Edwards* and its progeny, we hold that the trial court was correct in concluding that defendant's waiver of his Fifth Amendment rights was invalid. In reaching this conclusion, we acknowledge that two key issues are raised by the facts of this case: (1) whether defendant invoked this Fifth Amendment right to counsel at the Florida arraignment, and (2) whether any such invocation remained effective at the subsequent interrogation.

In *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), *cert. denied*, 107 S. Ct. 3240 (1987), the Seventh Circuit resolved these same issues in the context of a markedly similar factual situation. There, as here, defendant Espinoza was arrested and arraigned on a relatively minor charge. He requested counsel, and a public defender appeared on his behalf at the

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begins. *United States v. Wade*, 388 U.S. 218, 237 (1967). As the Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), however, the Fifth Amendment provides "an individual held for interrogation . . . the right to consult with a lawyer and to have the lawyer with him during the interrogation." *Id.* at 471.

arraignment. While Espinoza remained in custody, police investigation indicated his possible involvement in a recent homicide. In the interview that followed, Espinoza waived his rights under *Miranda* and confessed to the murder.

After Espinoza's conviction on the murder charge was affirmed on appeal, a federal district court granted a habeas corpus petition, ruling that his confession should have been suppressed. The Seventh Circuit upheld the district court's decision on Fifth Amendment grounds, and its opinion included a painstaking analysis of the very issues presented here.

First, because Espinoza did not assert his constitutional rights at the interrogation itself, the court set out to determine whether his earlier request for counsel at the arraignment constituted an invocation of his Fifth Amendment right to counsel. Citing *Michigan v. Jackson*, —— U.S. ——, 106 S. Ct. 1404 (1986) and *Connecticut v. Barrett*, —— U.S. ——, 107 S. Ct. 828 (1987), the court rejected the state's argument that this request was no more than an assertion of Espinoza's Sixth Amendment right as an accused in that particular prosecution. *Jackson* and *Barrett* make clear, as the court explained, that a broad interpretation must be given to a defendant's request for counsel, and that a court must presume, absent evidence to the contrary, that such an individual has invoked the full extent of his constitutional right to counsel. See *Jackson*, —— U.S. at ——, 106 S. Ct. at 1409 and *Barrett*, —— U.S. at ——, 107 S. Ct. at 832. Therefore, the *Espinoza* court reasoned, it must be presumed that a defendant who requests or accepts counsel at an arraignment is invoking both his Sixth Amendment and his Fifth Amendment rights. *Espinoza*, 813 F.2d at 123. Because the state presented no evidence indicating that Espinoza intended to limit his invocation to the Sixth Amendment, the court concluded that his unqualified acceptance of counsel at the

arraignment was an assertion, rather that a waiver, of his Fifth Amendment right. *Id.*

The Seventh Circuit went on to decide whether this invocation at the arraignment remained effective at the subsequent, but unrelated, murder interrogation. The court first held that, once asserted, the Fifth Amendment right to counsel terminates "only when the heightened potential for state-coerced self-incrimination ends—upon the release of the individual from police custody." *Id.* at 125. The court then concluded that Espinoza's invocation of his right at the arraignment also extended to the later interrogation regarding the murder. *Id.* at 126. If the rule were otherwise, the court reasoned, then the prophylactic purpose of the Fifth Amendment would be defeated because the heightened possibility of state "overreaching" continues to exist regardless of the timing or the subject matter of custodial interrogation. Citing *Edwards v. Arizona*, 451 U.S. at 484-85, the court held that the waivers obtained from Espinoza at the murder interrogation were invalid because the state initiated the questioning.

We adopt the reasoning of the Seventh Circuit. Here, defendant asked that an attorney be appointed to represent him in dealing with the State. We will not assume that defendant was in some way limiting his request for legal counsel; indeed, we must presume that defendant was invoking both his Sixth Amendment right and his Fifth Amendment right to counsel, and the State has not shown otherwise. As the Supreme Court has observed, an individual requesting counsel at his arraignment does not know which constitutional right he is invoking. *Jackson*, —— U.S. at ——, 106 S. Ct. at 1409-10 n.7 (quoting *Michigan v. Jackson*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984)). We hold that defendant's invocation of his Fifth Amendment right remained effective at the time of the interrogation, and that, because the State imper-

missibly initiated that interrogation, his purported waivers of this right were invalid.

Affirmed.

FOR THE COURT:

/s/ Edward J. Costello
EDWARD J. COSTELLO
D.J. (Ret.)
Specially Assigned

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket No. 87-023

STATE OF VERMONT

v.

RICK A. PRESTON

MOTION FOR CLARIFICATION

Now Comes the State of Vermont, by and through the Attorney General of the State of Vermont, and moves this Court for clarification of its recently issued revision of its opinion in the above-captioned case.

Due to inadvertence on the part of the State in its July 8, 1988 Motion for Reargument, the Court was directed to a single place in the record at page 7 containing an inaccurate factual description of the appellant's behavior concerning his request for counsel. The Court agreed and deleted the language as requested by the State.

The State did not, however, direct the Court's attention to a *second*, and essentially identical description of appellant's behavior while incarcerated, at page 5 of the Court's decision issued on July 1, 1988. See underlined excerpt from page 5 of the reissued decision, dated September 2, 1988: "Here, the lower court found that defendant requested counsel at his Florida arraignment on the fugitive from justice charge *and that he made fur-*

ther requests to see his attorney while he was incarcerated."

The deletion by the Court of language formerly appearing on page 7 in the July 2nd opinion (". . . and he continued his efforts to consult counsel while he was being held in custody.") creates an internal inconsistency in the decision. The transcript of the suppression hearing at pp. 8-9 clearly demonstrates that the court's finding in paragraph 31 [1] could only mean that the defendant made one oral and one written request for counsel prior to and at his arraignment. Now, because of the State's aforesaid inadvertence, the Court's present summary of the trial court's findings is in conflict with the latter portion of its own opinion. Striking the incorrect language at page 5 as this court struck the same language at page 7, will vitiate the conflict.

Dated: September 9, 1988

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

by: /s/ David E. Tartter
DAVID E. TARTTER
Assistant Attorney General

cc: Stephen Blodgett, Esq.
Terry Trono, Esq.

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[1] Paragraph 31 of the trial court's findings provided as follows: "Defendant testified without corroboration that he requested counsel five to ten times while he was in jail. Based on credible evidence, the court finds that he made one written and one oral request for counsel. At no time did he meet with an attorney."